

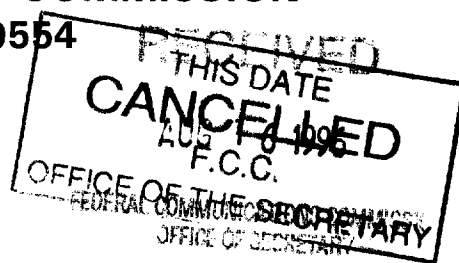
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 15 1996

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In the Matter of:

Amendment of the Commission's
Regulatory Policies to Allow
Non-U.S.-Licensed Space Stations to
Provide Domestic and International
Satellite Service in the United States
("DISCO II")



IB Docket No. 96-111

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REPLY COMMENTS OF NATSAT

Jack E. Robinson
President
**NATIONAL TELECOM SATELLITE
COMMUNICATIONS, INC.**
Clearwater House
2187 Atlantic Street
Stamford, CT 06902
(203) 425-4100

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INTRODUCTION

As a minority-owned small business seeking to play a role in the emerging and already oligopolistic Mobile Satellite Services ("MSS") industry,¹ National Telecom Satellite Communications, Inc. ("NATSAT"), based upon a review of all of the comments filed in the above-referenced Notice of Proposed Rule Making ("NPRM"), could very well be the only truly "objective" commenter in the entire proceeding.²

As a newborn infant amongst multi-billion dollar behemoths, NATSAT is indeed intrigued by the lengths to which these gargantuan competitors will go to carve out regulatory advantage in the NPRM as a way to create competitive advantage in the MSS marketplace.

For example, a quick summary of the MSS-related comments shows that:

- * Charter and Transworld believe that the FCC need not establish any rules at all governing the ability of non-U.S. MSS licensees to provide service in the United States.³ But, pray tell, if such rules are to be adopted, they should not apply to the Mexican and

¹ NATSAT filed an application with the Commission on July 15, 1996, to provide U.S. domestic MSS by leasing space segment, space stations and earth stations of domestic and/or foreign MSS providers. As a prospective MSS provider, NATSAT limits its comments herein to those affecting MSS specifically (as opposed to FSS or DTH).

² Although, as described below, the comments of Motorola/Iridium seem to be the most insightful.

³ NATSAT strongly disagrees with this premise, for if the FCC does not adopt some version of the ECO-Sat test, we will lose all ability to control foreign satellite transmissions within our borders, in strict violation of Section 301 of the Communications Act.

Russian deals that Charter and Transworld, respectively, have already negotiated bilaterally.⁴

- * ORBCOMM, seeing the imminent rise of ICO on the competitive horizon, generally supports the ECO-Sat test, but suggests that with respect to IGOs (including their offspring and/or affiliates, such as ICO) there should be a “critical mass” test followed by a “competitive consequences within the U.S.” analysis. However, ORBCOMM does not give sufficient detail to determine just how the “competitive consequences” analysis is to be applied by the International Bureau on a consistent day-to-day basis.
- * KDD, the Japanese Inmarsat and INTELSAT signatory (as well as ICO shareholder), suggests that the only ECO-Sat test for MSS should be the flexible and ad-hoc “competitive consequences” test. There’s both “good news” and “bad news” inherent in this suggestion. The “good news” is that a competitive consequences test is probably the least burdensome from a regulatory and administrative standpoint to apply, and also provides the most flexibility. The “bad news” is that this inherent flexibility will inevitably unleash a torrent of lobbying and political arm-twisting, the likes of which the International Bureau has never seen!

⁴ In all fairness to Charter, perhaps NAFTA provides sufficient oversight with respect to Mexican satellite deals. However, NATSAT can see no such rationale applying to Russian deals.

- * Newcomb and Mobile Datacom suggest that the MSS category be further subdivided between non-switched data and switched voice services, allowing them to avoid the huge battles presently being waged between the Big LEO "Gang of Three" (Globalstar, Iridium and Odyssey) and ICO/Comsat.
- * Lockheed Martin, seeking to modify the "critical mass" approach, seems to want the International Bureau to become an unofficial arm of the International Monetary Fund, as a result of analyzing such myriad factors as a nation's GDP, population, demographics, sociological characteristics, state of overall development, potential demand for satellite services, etc. Furthermore, by claiming that the "appropriate approach is necessarily dependent on the circumstances," Lockheed Martin essentially wants the International Bureau to slide down the slippery slope of having no formal approach to the problem at all.
- * TMI and AMSC desire that their joint U.S.-Canada systems be virtually exempt from an ECO-Sat test. Although this appears to make common sense, this suggestion might allow foreign MSS operators with whom the Canadians do business to potentially subvert the "open skies" intent of ECO-Sat through indirect

market barriers erected through a Canadian joint venture.⁵

- * INTELSAT does not want any percentage test applied to IGOs with respect to how many of their member nations provide competitive access to U.S. providers (and with good reason, since most of those nations' markets remain closed to U.S. operators).
- * BT, the U.K.'s Inmarsat signatory, seems not to want any oversight of the use of Inmarsat facilities in the provision of U.S. domestic MSS.
- * COMSAT and ICO, in rather ingenious arguments, attempt to use this proceeding as a short-cut to licensure as U.S. domestic MSS providers.
- * And, of course, the "Gang of Three" continue to be locked in their interminable death-struggle with COMSAT/ICO to prevent their licensure at all costs!

Notwithstanding attempts by most commenters to paint the ECO-Sat test as "complex" and "difficult to apply," the International Bureau should be congratulated for devising what is truly a simple and straight-forward regulatory procedure. However, it would be a serious mistake to delay adopting the ECO-Sat test for any reason, let alone (as some commenters

⁵ AMSC's own comments, which seek to prevent any further L-band MSS providers from offering service in the United States subject to further technical and frequency coordination requirements being met, are obviously targeted toward ICO/Comsat.

suggest) until there is an "open skies" agreement in the WTO in February 1997. In fact, waiting for a truly "open skies" agreement for MSS to come out of the WTO will be like the Commission waiting by the side of the road for Godot!

Thus, not only is the ECO-Sat test the correct regulatory policy for global MSS, but it must be enacted without delay. Otherwise, the Gang of Three will have an inherently difficult time obtaining authorizations in the 200+ countries needed to offer the U.S. consumer truly global MSS coverage before the turn of the century.

**I. THE "GLOBAL ECO-SAT" TEST, AS PROPOSED BY
MOTOROLA/IRIDIUM, MUST BE ADOPTED IMMEDIATELY**

The "Global ECO-Sat" test, in the form proposed by Motorola/Iridium, appears to be the test most applicable and effective for MSS purposes. Although Comsat asks for U.S. authority on a "public interest" argument, and ICO claims that it should be treated the same as any other non-IGO-affiliated private company, the bare truth of the matter is that if Comsat and/or ICO are awarded U.S. domestic MSS authority outside of the "Global ECO-Sat" framework, the chances of the Gang of Three acquiring sufficient foreign rights will lie somewhere between "slim" and "none" (at least within the near future).

Although Comsat is correct in its assertion that its presence in the U.S. market will increase competition and lower prices over the long term, the

"public interest" is concerned not only with lower prices, but with the ability of U.S. operators to exploit opportunities abroad (which will result in larger economic and job growth here in the U.S.). But those foreign opportunities will become increasingly limited if Comsat and/or ICO are allowed to operate domestically before the Global ECO-Sat test can pry open the truly "closed skies" of many nations around the world.

Although NATSAT is an infant in the MSS industry, its principals have had substantial experience in the aviation world, where the only way U.S. airlines have been able to gain landing rights at the world's airports is through the application of an analogous "ECO-Sat" test used by the U.S. Department of Transportation ("DOT"). In fact, even with such a test in place today, U.S. airlines continue to have a tremendously difficult time gaining continued access to London, Tokyo, Paris, etc. But for the DOT's application of a test like the ECO-Sat test, U.S. airlines would be severely limited at many major airports around the world, even though the U.S. presently has bilateral aviation agreements with all of these supposed "open skies" countries.

NATSAT sees the same thing happening in MSS if the Global ECO-Sat test is not adopted forthwith. Once Comsat and/or ICO gain authority to provide MSS in the United States, the Gang of Three most likely will suddenly not have their telephone calls returned from around the world in their efforts to gain foreign market access. In fact, the IGOs (and their constituent

countries) move so slowly⁶ (and this with an imminent ECO-Sat test looming over their heads), one shudders to think of the glacial pace at which the IGOs and their constituent nations will act when it comes to opening markets around the world after Comsat and/or ICO have already acquired U.S. rights.

Although the United States (through the FCC) has clearly proven that it truly believes in open skies, it is mere wishful thinking to believe that by February 1997 the WTO will have more than the dozen or so nations who have already committed to open skies increase their number. In fact, the only way to prod the WTO nations to act responsibly is to enact the Global ECO-Sat test immediately, so they can see before the February 1997 deadline that they better "get with the program" if they are to reap the advantages of global free trade in the MSS context.

II. THE GLOBAL ECO-SAT TEST IS REASONABLE AND RATIONAL

NATSAT agrees entirely with the proposed Motorola/Iridium Global ECO-Sat test, and wishes to expand on one of the key factors found therein.

In determining the existence of market access in particular countries, one of the de jure/de facto tests would be the extent to which the rules of certain countries permit the transportation of MSS handsets across their boundaries. **NATSAT cannot stress the importance of this requirement enough.**

⁶ According to Motorola/Iridium, Inmarsat has been providing land mobile satellite services since 1992, even though the governing body of Inmarsat has yet to approve such services. See Motorola/Iridium Comments at 7.

Even today, NATSAT's principals have had difficulty clearing customs in certain foreign countries with certain types of mobile satellite devices. The only reason a customer will buy an MSS product is so that it can be used anywhere in the world. However, if the customer fears that his \$3,000 MSS handset will be confiscated by customs agents in Karachi or Bucharest, that customer will be less likely to want to become a customer or remain one upon his return to the United States.

This is why it is vitally important that the FCC, in applying the Global ECO-Sat test proposed by Motorola/Iridium, makes sure that countries are not able thwart the requirements of the test through the use of restrictive (and usually "unofficial") customs practices.

III. THE GLOBAL ECO-SAT TEST SHOULD BE APPLIED TO ALL PENDING APPLICATIONS, WITH CERTAIN EXCEPTIONS

In its original comments, NATSAT requested that the Commission not apply the ECO-Sat test to pending applications. Upon further analysis, however, NATSAT must modify that earlier position. It is NATSAT's considered opinion that the Global ECO-SAT test must be applied to all pending MSS applications (except for the exception noted below), because if it is not applied to the applications of Comsat, ICO and/or any IGO, the Global ECO-SAT test will wind up being nothing but a "toothless tiger."

Furthermore, because the Motorola/Iridium Global ECO-Sat test is sufficiently encompassing to apply to IGOs, the Commission can apply it to IGOs without resorting to alternative IGO-specific regulatory policies.⁷

Finally, NATSAT believes that the only exception to applying the Global ECO-Sat test should be for applications filed by U.S. designated entities ("DEs") not later than July 15, 1996, the date that original comments were due in this proceeding.⁸

On July 15, 1996, NATSAT filed with the Commission an application to offer U.S. domestic "Big LEO" MSS in the 1.6/2.4 GHz band by using the Big LEO infrastructure (space stations, space segment and earth stations) of domestic and/or foreign Big LEO providers. The Commission should exempt from the Global ECO-Sat test those applications filed by DEs, such as NATSAT, which were filed by the comment date for this NPRM. The primary reason for such an exemption is to allow DEs to participate in the MSS industry with minimal regulatory restrictions. In addition, DEs will likely be able to attract the substantial domestic and/or foreign capital investment necessary to compete in the MSS industry if they can offer potential investors some differentiating factor from the likes of the industry behemoths such as the

⁷ As suggested in the NPRM ¶¶ 66-68.

⁸ NATSAT suggests that the International Bureau use the definitions for DEs used in the CMRS context, as defined in Section 24.709 of the Commission's rules.

Gang of Three. A key differentiating factor for DEs in terms of attracting much-needed investment will be exemption from the Global ECO-Sat test.

IV. EXEMPTING DESIGNATED ENTITIES FROM THE GLOBAL ECO-SAT TEST WOULD SATISFY THE INTENT OF CONGRESS AND SERVE THE PUBLIC INTEREST

But for the fact that the Gang of Three filed their MSS applications with the Commission prior to the Commission receiving auction authority from Congress in 1993, the Gang of Three's licenses, which have been granted to them for free, would instead have been auctioned to the highest bidder. Thus, the Commission has a responsibility to allow DEs the opportunity to enter the MSS industry as a way to foster competition in what is already a three-legged oligopoly consisting of billion-dollar players.⁹

In Section 309(j) of the Communications Act, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."¹⁰ Thus, the Commission should ensure that small businesses and minority entrepreneurs have the opportunity to "obtain licenses and provide [spectrum based] services."¹¹

⁹ Just recently, the MSS applications of MCHI and Constellation were denied for their failure to make the requisite financial showing. See Memorandum Opinion and Order, FCC 96-279 (rel. June 27, 1996).

¹⁰ 47 U.S.C. § 309(j)(4)(D).

¹¹ Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532 at ¶ 93 (1994).

To achieve this goal, the statute requires the Commission to “consider the use of tax certificates, bidding preferences, and other procedures.”¹²

NATSAT contends that if the Commission exempts from the Global ECO-Sat test applications of DEs, filed on or before July 15, 1996, to resell in the United States MSS provided by domestic and/or foreign MSS operators, this will qualify as an “other procedure” by which the Commission can satisfy its Congressional directive to promote “economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minorities and women.”¹³

Thus, it is clear that Congress has mandated that the Commission maximize the opportunities for small minority-owned businesses, like NATSAT, to provide MSS. And given the huge amounts of capital required (at least \$2 billion)¹⁴ to construct, launch and operate an MSS system, it will be virtually impossible for a minority-owned small business such as NATSAT to compete in the MSS industry against such corporate giants as the Gang of Three without some kind of regulatory advantage with which to attract capital and offer high-quality and affordable MSS to the American public.

The Commission can satisfy its Congressional mandate of giving companies like NATSAT an opportunity to participate in spectrum-based

¹² In 1995, Congress repealed the section of the Internal Revenue Code providing for the use of minority tax certificates.

¹³ 47 U.S.C. § 309(j)(4)(C).

¹⁴ Report and Order, CC Docket No. 92-166, 9 FCC Rcd 5936 at ¶ 30 (1994) (“*Big LEO Order*”).

services such as MSS by exempting from the Global ECO-Sat test all applications to provide domestic MSS filed by DEs not later than July 15, 1996.¹⁵

In addition to satisfying the intent of Congress, the Commission's granting this "DE exemption" to the Global ECO-Sat test will also be in the public interest. Over the past several years, Commission policy increasingly has been marked by the resolution to open both domestic and international markets to competition and the broadest range of competitors. The Commission has concluded time and again that competition serves to lower prices, increase consumer choices, and further develop the national and global information infrastructures. Entry into the MSS marketplace by DEs, such as NATSAT, will foster competition with an entrepreneurial spirit generally lacking with the Gang of Three, Comsat, ICO and the IGOs, none of which are small or minority-owned businesses.

In light of the recent Commission actions to open up markets to competition, and given the recent enactment of the Telecommunications Act of 1996, it is clear that granting this "DE exemption" to the Global ECO-Sat test is in the public interest. Such grant will serve to make the MSS marketplace more competitive and expand consumer choice, lower prices, and

¹⁵ In fact, the Commission has noted that there are presently no small businesses in the MSS industry, in that only six applications were filed to operate Big LEO MSS systems and "none of the applicants qualifies as small, minority-owned or women-owned." *Big LEO Order* at ¶ 80. With the recent denial of the MSS applications of Constellation and MCHI, the need for the presence of DEs in the MSS industry has become even more acute.

help develop the national and global information infrastructures; while at the same time assist small businesses owned by minorities and women to play an active role in the MSS industry.

By granting the “DE Exemption” to the Global ECO-Sat test, the Commission will also ensure that the Gang of Three is “kept honest,” thereby resulting in more high-quality services at lower prices for consumers. For example, the Gang of Three may not want to “rock the competitive boat” by offering advanced services quickly at low prices, absent some “spirited” entrepreneurial competition. However, if DEs like NATSAT are capable of offering MSS in the United States free from the strictures of the Global ECO-Sat test, then the Gang of Three will always know that they run the risk of NATSAT beating them on price, technology, customer service, etc. In other words, by granting the “DE exemption” to the Global ECO-Sat test, the Commission can keep the Gang of Three honest!

Finally, the Commission has already stated that, at least with respect to DEs such as NATSAT, the only way for them to participate in the MSS industry is as a reseller “by leasing space segment capacity . . . or by offering services to end users.”¹⁶ However, the ability to do this cost-effectively will be determined by the ability of DEs to access space segment of any and all MSS providers. This goal will be furthered if DEs are exempted from the Global ECO-Sat test.

¹⁶ *Big LEO Order* at ¶ 80, note 93.

V. CONCLUSION

In summary, NATSAT respectfully requests that the Commission adopt without delay the Global ECO-Sat test as proposed by Motorola/Iridium. However, NATSAT also requests that the Commission exempt from application of the Global ECO-Sat test any and all MSS applications filed by DEs on or before the Comment Date for the NPRM (July 15, 1996).

Respectfully submitted,

**NATIONAL TELECOM SATELLITE
COMMUNICATIONS, INC.**

A handwritten signature in black ink, appearing to read "Jack E. Robinson", is written over a horizontal line.

Jack E. Robinson
President & Chief Executive Officer
National Telecom Satellite Communications, Inc.
Clearwater House
2187 Atlantic Street
Stamford, CT 06902
(203) 425-4100

Dated: August 12, 1996

CERTIFICATE OF SERVICE

I, Jack E. Robinson, hereby certify that the foregoing **Reply Comments of NATSAT** were served on the following persons by first-class mail, postage prepaid, this 12th day of August, 1996:

Donald H. Gips
Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

John Stern, Esq.
Legal Advisor
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Tom Tycz
Chief, Satellite Division
International Bureau
Federal Communications Commission
2025 M Street, N.W., Ste 6010
Washington, DC 20554

Cecily C. Holiday
Deputy Chief, Satellite Division
International Bureau
Federal Communications Commission
2025 M Street, N.W., Ste 6324
Washington, DC 20554

Fern Jarmulnek
Chief, Policy Branch
Satellite Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 658
Washington, DC 20554

James Ball
Associate Chief, Policy
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Karen Kornbluh
Telecommunications Policy Analyst
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Julius Genachowski, Esq.
Special Counsel
Office of the Chairman
Federal Communications Commission
1919 M Street, N.W., Ste 814
Washington, DC 20554

Paula Ford
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Virginia Marshall
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Ruth Milkman
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Diane Cornell
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Brett Haan
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Olga Madruga-Forti
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Phyllis Hartsock
Chief Counsel's Office
NTIA
U.S. Department of Commerce
Room 4713
14th & Constitution Avenue, N.W.
Washington, DC 20230

Michael Deich
Special Assistant to the President
for Economic Policy
Office of Policy Development
Old Executive Office Building
17th & Pennsylvania Avenue, N.W.
Washington, DC 20500

Joslyn Read
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Peter Cowhey
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Kelly Cameron
International Bureau
Federal Communications Commission
2000 M Street, N.W., Ste 800
Washington, DC 20554

Don Abelson
Chief Negotiator for Telecom & Info
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, DC 20506

Nancy Eskenazi
Telecom Policy Analyst
NTIA/OIA
U.S. Department of Commerce
Room 4701
14th & Constitution Avenue, N.W.
Washington, DC 20230

Maury D. Shenk, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Michael D. Kennedy
Vice President
Motorola, Inc.
1350 I Street, N.W., Ste 400
Washington, DC 20005

Howard D. Polsky
COMSAT Corp.
6560 Rock Spring Drive
Bethesda, MD 20817

Cheryl Tritt
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

Philip L. Verveer
Willkie, Farr & Gallagher
1155 21st Street, N.W., Ste 600
Washington, DC 20036

Norman P. Leventhal
Leventhal, Senter & Lerman
2000 K Street, N.W., Ste 600
Washington, DC 20006

Joel S. Winnik
Hogan & Hartson, LLP
555 Thirteenth Street, N.W.
Washington, DC 20004

Donald D. Wear, Jr.
Vice President
INTELSAT
3400 International Drive, N.W.
Washington, DC 20008

Henry Goldberg
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, DC 20036

F. Thomas Tuttle
Vice President
IRIDIUM, Inc.
1401 H Street, N.W., 8th Floor
Washington, DC 20005

Richard E. Wiley
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006

William D. Wallace
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

William F. Adler
Vice President
GLOBALSTAR
3200 Zanker Road
San Jose, CA 95134

Joan M. Griffin
BT North America, Inc.
601 Pennsylvania Avenue, N.W.
Washington, DC 20004

Henry M. Rivera
Ginsburg Feldman & Bress
1250 Connecticut Avenue, N.W.
Washington, DC 20036

Tally Frenkel
WORLDCOM, Inc.
15245 Shady Grove Road, Ste 460
Rockville, MD 20850

Philip V. Otero
Vice President
GE American Communications
Four Research Way
Princeton, NJ 08540

Gary M. Epstein
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Albert Halprin
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue, N.W.
Washington, DC 20005

Kazunori Inagaki
Director
Kokusai Denshin Denwa Co., Ltd.
3400 International Drive, Ste 3K-02
Washington, DC 20008

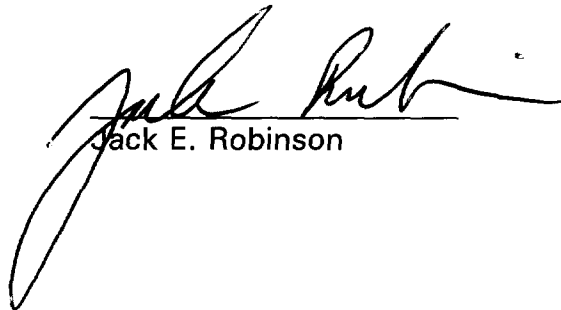
Terri B. Natoli
Fleischman and Walsh, LLP
1400 Sixteenth Street, N.W.
Washington, DC 20036

Gerald Musarra
Senior Director
Space and Strategic Missiles Sector
Lockheed Martin Corporation
1725 Jefferson Davis Highway
Arlington, VA 22202

Debra A. Smilley-Weiner
Deputy General Counsel
Lockheed Martin
P.O. Box 800
Princeton, NJ 08543

Lon C. Levin
Vice President
AMSC Subsidiary Corporation
10802 Parkridge Boulevard
Reston, VA 22091

Bruce D. Jacobs
Fisher Wayland Cooper Leader &
Zaragoza, LLP
2001 Pennsylvania Avenue, N.W.
Washington, DC 20006



Jack E. Robinson